83451-2
NO. 37008-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SAM DONAGHE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge

REPLY BRIEF OF APPELLANT

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RULES, STATUTES AND OTHERS (CONT'D)

A. STATEMENT OF FACTS IN REPLY

Donaghe seeks restoration of his voting rights. Standing in his way is the lower court's refusal to issue the certificate of discharge to which he is entitled. Brief of Appellant (BOA) at 8-14. According to statute, the court "shall discharge the offender and provide the offender with a certificate of discharge" upon receiving notice from DOC that the offender has completed all requirements of the sentence. RCW 9.94A.637(1)[1] (emphasis added). In support of his motion for a certificate of discharge for the 1991 offenses, Donaghe tendered a letter from DOC indicating he was released on April 25, 1996, after serving his incarceration time, and was on supervision with the Department of Corrections from 4/25/96 until 11/24/04 when his cases were terminated. CP 41.

Despite DOC's letter indicating Donaghe has completed the terms of his sentence, the court refused to issue the certificate of discharge, reasoning that Donaghe's one-year period of community custody tolled, and

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[1] When an offender has completed all requirements of the sentence, including any and all legal financial obligations, and while under the custody and supervision of the department, the secretary or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender's last known address.

RCW 9.94A.637(1).

has continued tolling the last 12+ years, since his transfer to, and involuntary commitment at, the Special Commitment Center (SCC). 2RP 9-10; see also CP 44-46; RCW 9.94A.625(3).[2]

In his opening brief, Donaghe argued the court acted outside its authority in refusing to issue the certificate of discharge, relying on RCW 9.94A.625(4),[3] which grants DOC exclusive authority to determine tolling. Although the Legislature vested exclusive authority to determine tolling in the department in 1993, after Donaghe committed his offenses, Donaghe argues the amendment is clearly remedial and therefore applies retroactively. BOA at 8-12.

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[2] Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to RCW 9.94A.740 or 9.94A.631 and is later found not to have violated a condition or requirement of community custody, community placement or community supervision, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision.

RCW 9.94A.625(3).

[3] For terms of confinement or community custody, community placement, or community supervision, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision.

RCW 9.94A.625(4).

Donaghe also argued that application of the tolling statute in this instance does not serve its purpose. BOA at 13 (citing State v. Flores-Serpas, 89 Wn. App. 521, 524, 949 P.2d 843 (1998) (in interpreting a different subsection of the tolling statute, court recognized Legislature intended tolling only where individual *voluntarily* absented himself not where he was deported against his will)).

B. ARGUMENT IN REPLY

THE TRIAL COURT ERRED IN REFUSING TO ISSUE THE CERTIFICATE OF DISCHARGE BECAUSE DONAGHE HAS COMPLETED ALL THE TERMS OF HIS SENTENCE.

1. The 1993 Amendment to RCW 9.94A.637(4) is Remedial and its Retroactive Application Furthers its Remedial Purpose.

In response, the state argues the court was within its authority to determine tolling, because the statute in effect at the time the crimes were committed -- former RCW 9.94A.170(4)[4] -- allowed the court to determine

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[4] For confinement sentences, the date for the tolling of the sentence shall be established by the entity responsible for the confinement. For sentences involving supervision, the date for the tolling shall be established by the Court, based upon reports from the entity responsible for the supervision.

RCW 9.94A.170(4) (1989). In 1993, the Legislature amended the language of subsection 4 as set forth in footnote 3. Laws of 1993, ch. 31, § 2. RCW 9.94A.170 was later recodified as RCW 9.94A.625. Laws of 2000, ch. 226, § 5.

tolling. Brief of Respondent (BOR) at 1-5. According to the state, the entity to determine tolling must be determined according to the law in effect at the time the crime was committed. BOR at 1-5 (citing RCW 9.94A-.345;[5] State v. Bader, 125 Wn. App. 501, 503, 105 P.3d 439 (2005); State v. Taylor, 111 Wn. App. 519, 523, 45 P.3d 1112 (2002); In re Personal Restraint of Albritton, 143 Wn. App. 584, 591 fn. 4, 180 P.3d 790 (2008)).

The state's reliance on RCW 9.94A.345 is misplaced. Under the statute, "any sentence imposed . . . shall be determined in accordance with the law in effect when the current offense was committed." Donaghe's sentence was imposed in 1991. The issue is not whether the sentence imposed was determined in accord with the law in effect at the time of the offense, but which entity is responsible for determining whether a portion of it has been carried out.

The state's reliance on the cited cases is also misplaced. In Bader, the court construed former RCW 9.94A.120(10)(a) (Laws of 1997, ch. 340, § 2, recodified as RCW 9.94A.505. That statute provided:

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[5] Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

RCW 9.94A.345.

> When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, the court shall, *in addition to other terms of the sentence*, sentence the offender to community custody for three years or up to the period of earned early release . . . whichever is longer. The community custody shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody *in lieu of earned early* release in accordance with [former] RCW 9.94A.150(1) and (2).

Bader, 125 Wn. App. 501 (emphasis in original).

At the outset, the court noted, "Bader incorrectly asserts that we must use the law in effect at the time of sentencing." Bader, 125 Wn. App. at 503. Citing to RCW 9.94A.345, the court wrote: "We review Mr. Bader's sentencing issue under the law in effect at the time of the offense." Id. The court next addressed Bader's argument that the statute somehow allowed him to "reduce the incarceration portion of his sentence by the mandatory three-year community custody term 'in lieu of' reducing it by his earned early release time." Bader, 125 Wn. App. at 504-506. The court was not persuaded. Id.

At first blush, the state's reliance on Bader might have some appeal. After all, it addresses the statute to be applied to determine the *commencement* of community custody, whereas here one might be tempted to characterize the issue as one of tolling, i.e. when community custody stops.

Such a characterization would be incorrect, however. The issue in not one of tolling, but one of procedure -- which entity is responsibly to determining its applicability. Regardless of the entity responsible, the rules as to tolling remain the same.

The Bader court did not set forth the version of the statute Bader argued should apply. But it is easy to imagine a scenario in which a change to the statute setting forth the commencement of community custody would affect a substantive or vested right. For example, had the state sought to sentence Bader under a later version of the statute providing that court-imposed community custody would not begin to run until after the offender served his community custody in lieu of earned early release, Bader would have an argument that application of the new statute impacted a substantial right because it increased Bader's overall period of community custody.[6]

Indeed, a similar argument was successful in the Taylor case relied upon by the state. Taylor, 111 Wn. App. at 524. There, the appellate court held the trial court erred in imposing 36-months of community

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[6] Under RCW 9.94A.728(2)(b), certain offenders are not eligible for earned early release only transfer to community custody in lieu of earned early release. RCW 9.94A.715(1)(b) allows court-ordered community custody to begin when the offender is transferred to community custody in lieu of earned early release pursuant to RCW 9.94A.728.

custody, as that was not an option in 1996, when Taylor committed his offenses.

Similarly, the court held in Albritton that he was entitled to credit for the community custody portion of his DOSA (upon its revocation) in accord with the DOSA statute in effect at the time of his offense. Albritton, 143 Wn. App. at 591 and n.4. The DOSA statute provided that "if an offender fails to complete or DOC administratively terminates the offender from the DOSA program, the offender is reincarcerated to serve the balance of the unexpired sentence subject to the rules relating to earned early release." Albritton, 143 Wn. App. at 592 (citing former RCW 9.94.660(5)).[7]

And significantly, the court ruled Albritton was entitled to community custody credit for time he spent incarcerated for violating the conditions of his DOSA -- despite RCW 9.94A.625(3). Albritton, 143 Wn. App. at 594-95. Accordingly, Albritton actually supports Donaghe's argument, because the court gave him community custody credit for time he spent incarcerated in spite of RCW 9.94A.625(3)'s tolling provision.

While the cases cited by the state address community custody and hold the law in effect at the time of the crime applies, they do not support

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[7] The current RCW 9.94A.660(5) provides for the same.

the state's position that former RCW 9.94A.170(4) applies here. The cited cases address *substantive* rules regarding how community custody is credited. In contrast, this case addresses an amendment that merely affects a change of procedure -- the entity responsible to determine tolling. The rules are the same regardless of the determining body. The state's comparison to Bader, Taylor and Albritton to the present case is akin to comparing apples and oranges.

The state recognizes that remedial rules apply retroactively where retroactive application would further their remedial purpose. BOR at 4. Yet the state questions "how the remedial purpose would be furthered by applying the current statute" here, because "DOC has already terminated its supervision of Donaghe, and thus will not be making any decisions about his sentence." BOR at 4. Whether retroactive application of a remedial statute will further its remedial purpose, however, is not determined by its subjective application to a particular individual. Rather, the question is whether retroactive application of the statute *generally* furthers its remedial purpose. See, e.g., Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal, 39 Wn. App. 609, 617, 694 P.2d 697 (1985) ("The 1983 amendment allows "damages" for humiliation and suffering,

and these "damages," though limited to $1,000, are clearly a remedy intended to compensate the injured party").

The amendment here is patently remedial because it relates to practice, procedure, or remedies and does not affect a substantive or vested right. Marine Power & Equip. Co., 39 Wn. App. at 617; see also In re Marriage of Hawthorne, 91 Wn. App. 965, 968-69, 957 P.2d 1296 (1998) ("Because RCW 26.19.080, as amended, does not create a new right of action but merely clarifies the procedures the obligor may use to recoup payments made for daycare expenses which are not incurred, it is a remedial statute. The trial court could therefore apply it retroactively").

Retroactive application of RCW 9.94A.625(4) furthers its remedial purpose, because it streamlines the procedure for determining tolling. Pursuant to the amendment, the courts no longer determine tolling "*based on the reports from the entity responsible for the supervision.*" Former RCW 9.94A.170(4) (emphasis added). Rather, "the entity responsible for the supervision" makes the determination itself. The amendment essentially cuts out the middleman. It therefore applies retroactively. See e.g. Marine Power & Equip. Co., 39 Wn. App. at 618-19.

But even if this Court determines former RCW 9.94A.170(4) applies, the trial court nevertheless erred in refusing to issue the certificate

of discharge. Under the former statute, the date for tolling shall be established by the court, based upon reports from the entity responsible for the supervision. The report from the entity responsible for Donaghe's supervision indicated DOC had supervised Donaghe for 8 years, at which time it terminated his cases. Accordingly, the only report before the court indicated Donaghe's community supervision was complete, not tolled.

2. Donaghe Has Completed the Community Custody Portion of His Sentence.

The state argues Donaghe's reliance on Flores-Serpas is misplaced, because the court in that case was interpreting RCW 9.94A.625(2), which requires tolling for those who have absented themselves, whereas the issue here is the applicability of RCW 9.94A.625(3), which requires tolling of community custody during any period of confinement "for any reason."

As noted above, however, Division One has refused to apply the "for any reason" subsection in the DOSA context. Albritton, 143 Wn. App. at 594-95. And more recently, Division Three has refused to apply it in circumstances analogous to those here. In re Personal Restraint of Knippling, 144 Wn. App. 639, 183 P.3d 365 (2008).

Knippling was convicted of two counts of second degree assault and one count of animal cruelty and given an exceptional sentence. The appellate court reversed and remanded his exceptional sentence, based on

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (any fact that increases punishment beyond the standard range must be pled and proved to a jury beyond a reasonable doubt). On remand, Knippling was resentenced to 17-month concurrent sentences. Because he had already served 41 months of the original exceptional sentence, he was released immediately to community custody. Knippling, 144 Wn. App. at 641-42.

In his personal restraint petition, Knippling argued he should be given credit against his 18 to 36 months of community custody for the extra 24 months he was incarcerated beyond his standard range sentence. The state countered that RCW 9.94A.625(3) disallowed such credit because it requires community custody to toll during any period of time the offender is in confinement for any reason. Knippling, 144 Wn. App. at 642.

The majority opinion, recognizing the only exception contained in RCW 9.94A.625(3) was inapplicable, nonetheless refused to apply the incarceration for any reason tolling provision:

> RCW 9.94A.625(3) is not controlling here. This statute must be read in the context of the entire sentencing scheme. See State v. Stratton, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). Under RCW 9.94A.715(1), "community custody . . . begin[s]: (a) Upon completion of the term of confinement; [or] (b) at such time as the offender is transferred to community custody in lieu of earned release." (Emphasis added.) Mr. Knippling completed his term of

> confinement 24 months before he was actually released from prison. Under RCW 9.94A.715(1), his community custody thus began 24 months before he was released.
>
> Our interpretation of RCW 9.94A.715(1) is consistent with RCW 9.94A.625(3). The latter statute deals with tolling of the term of community custody after the term of community custody has started. It provides that the community custody term does not run during time in confinement for new crimes or for community custody violations. In contrast, RCW 9.94A.715(1) addresses the point in time at which the term of community custody begins. And, the statute is clear that the term of community custody begins when the offender completes his confinement time.

Knippling, 144 Wn. App. at 642-43 (emphasis in original, footnote omitted).

The Knippling decision makes sense. It harmonizes RCW 9.94A.715(1) with RCW 9.94A.625(3), recognizes the requirement of tolling when the offender has violated a community custody condition or committed some other wrongful act interrupting the period of community custody, but appropriately limits the "for any reason" tolling provision to those situations where the individual is on community custody but commits some wrongful act to interrupt his period of community custody. In do holding, the court deftly sidesteps the injustice that would otherwise result, i.e. increasing Knippling's sentence despite any wrongful act on his part. The situation is analogous to Donaghe's.

Under Knippling and RCW 9.94A.715(1), Donaghe's community custody sentence began in 1995 when he completed his term of confinement and was transferred to SCC. He completed his term of community custody one year later. Since he has completed all the terms of his sentence, he is entitled to a certificate of discharge, regardless of the entity responsible for determining tolling.

3. Donaghe Has Presented Evidence Entitling Him to a Certificate of Discharge.

Finally, the state argues that even if current RCW 9.94A.637(4) applies, Donaghe is not entitled to a certificate of discharge, because DOC did not *itself* notify the court it had terminated Donaghe's cases. Donaghe should not be punished for the department's failure to follow through with the requisite notification when it completed supervision and terminated his cases. Assuming the department's failure can be held against him, however, Donaghe is entitled to a certificate of discharge under RCW 9.94A.637(1)(c).[8]

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[8] (c) When an offender who is subject to requirements of the sentence in addition to the payment of legal financial obligations either is not subject to supervision by the department or does not complete the requirements while under supervision of the department, it is the offender's responsibility to provide the court with verification of the completion of the sentence conditions other than the payment of legal financial obligations. When the offender satisfies all

(continued...)

Without argument or citation to authority, the state argues RCW 9.94A.637(1)(c) does not apply. Yet, the state notes in its response, "presumably if Donaghe provided proof that he had completed all conditions of his sentence, including community supervision, the court would be required to issue a certificate of discharge." BOR at 10 (in its discussion of RCW 9.94A.637(1)(c)). Like the amendment to RCW 9.94A.625(4), however, the addition of subsection (c) to 9.94A.637(1) is clearly remedial. Accordingly, by virtue of the DOC letter, and the Knippling decision, Donaghe has presented proof he has completed all conditions of his sentence.

B. CONCLUSION

For the reasons stated herein and in Donaghe's opening appellate brief, this Court should reverse the lower court's ruling and remand with

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[8](...continued)

> legal financial obligations under the sentence, the county clerk shall notify the sentencing court that the legal financial obligations have been satisfied. When the court has received both notification from the clerk and adequate verification from the offender that the sentence requirements have been completed, the court shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

RCW 9.94A.637(1)(c); Laws of 2004, ch. 121, § 2.

instructions to issue the certificate of discharge as required under RCW 9.94A.637(1) and (1)(c).

DATED this 8th day of December, 2008.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON Respondent, v. SAMUEL DONAGHE, Appellant.	)	COA NO. 37008-5-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF DECEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF DECEMBER, 2008.

x Patrick Mayovsky